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No. 88-705

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND UTAH POWER & LIGHT COMPANY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Interest of the Amici Curiae	1
Introduction	2
Summary of Argument	3
Argument	3
I. The Federal Water Power Act Was Intended To Create A Comprehensive *Federal* System Of Water Power Licensing And Regulation	3
II. Section 27 Of The Federal Water Power Act Was Not Intended To Authorize Conflicting State Control And Regulation Of Federally Licensed Water Power Development	7
III. The Reclamation Act Of 1902's Interpretation In *California v. U.S.* Did Not Change Either The Federal Power Act Or Section 27	12
IV. The Overruling Of *First Iowa* Would Destroy Licensing Stability The Federal Power Act Was Created To Provide	16
Conclusion	19

TABLE OF AUTHORITES

Cases

Page

California ex rel. State Water Resources Bd. v. Federal Energy Regulation Commission 877 F.2d 743 (9th Cir. 1989) *cert. granted* California v. FERC, 58 U.S.L.W. 3369 (U.S. Dec. 4, 1989) (No. 89-333) 2

California v. United States 438 U.S. 645 (1978) 13, 14

Federal Power Commission v. Union Electric Co. 381 U.S. 90 (1965) 14

First Iowa Hydro-Electric Cooperative v. Federal Power Commission 328 U.S. 152 (1946) .....*passim*

FPC v. Oregon 349 U.S. 435 (1955).....14, 17

New England Power Co. v. New Hampshire 455 U.S. 331 (1982) 18

Pacific Gas and Electric Co. v. FERC 720 F.2d 78 (D.C. Cir. 1983) 17

Springfield v. McCarren 549 F. Supp. 1134 (1982).....4, 6, 16

Udall v. Federal Power Commission 387 U.S. 428 (1967) 14, 17

United States v. Appalachian Electric Power Co. 311 U.S. 377 (1940) 14

Statutes

Electric Consumers Protection Act of 1986 P.L. 99-495, 100 Stat. 1243 18

Federal Power Act of 1920 41 Stat. 1063 *et. seq.* 16 U.S.C.A. 791a-823(b) (West 1985 and Supp. 1988):

Section 4(e), 16 U.S.C.A. § 797(e) 18

Section 9(a)(2), 16 U.S.C.A. § 802(a)(2) 7, 8

Section 9(b), 16 U.S.C.A. § 802(b) 17

Section 10(a), 16 U.S.C.A. § 803(a) 14

Section 10(j), 16 U.S.C.A. § 803(j) 17

Section 27, 16 U.S.C.A. § 821 .....2, 3, 9, 10, 12

Section 31, 16 U.S.C.A. § 823(b) 18

Federal Power Act of 1935 49 Stat. 846, 16 U.S.C.A. 817(1) (West 1985 and Supp. 1988) 3, 6, 14

Reclamation Act of 1902 Section 8, 32 Stat. 390; 43 U.S.C.A. 372, 383 .....2, 3, 12, 13, 15, 16

TABLE OF AUTHORITES

Legislative

Page

House Debate on H.R. 16673 in 1914:

51 Cong. Rec. 13625 (August 11, 1914)
Congressman Ferris of Oklahoma..... 9

51 Cong. Rec. 13631 (August 11, 1914)
Congressman Mondell of Wyoming 15, 16

51 Cong. Rec. 13931-2 (August 18, 1914)
Congressman Mondell 7

51 Cong. Rec. 14070 (August 20, 1914)
Congressman Mondell 16

House Debate on S. 1419 in 1918:

56 Cong. Rec. 9114 (July 13, 1918)
Congressman Green of Iowa 11

56 Cong. Rec. 9115 (July 13, 1918)
Congressman Taylor of Colorado 9

56 Cong. Rec. 9813 (August 31, 1918)
Congressman Mondell 8

Senate Debate on H.R. 3184 in 1919:

59 Cong. Rec. 244 (December 6, 1919)
Senator Jones of Washington, Chairman of Senate Commerce Committee..... 6

59 Cong. Rec. 245 (December 6, 1919)
Senator Jones 10

59 Cong. Rec. 1041 (January 5, 1919)
Senator Nelson of Minnesota 10

H. Rep. No. 716, House Comm. on Water Power 65th Cong., 2d Sess. (1918) 4

Water Power: Hearings Before the Committee on Water Power, 65th Cong., 2d Sess. (1918):

O.C. Merrill 5, 10, 11

Congressman Taylor.....9, 10, 11, 12

Congressman Mondell 7, 8, 11, 12

Congressman Raker of California..... 8

No. 89-333

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INTEREST OF THE AMICI CURIAE

This brief is filed pursuant to Rule 37 of the Rules of the Supreme Court of the United States by the Pacific Gas and Electric Company, the Southern California Edison Company, the Pacific Power & Light Company and the Utah Power & Light Company (collectively Western Utilities)[1] as *amici curiae* in support of Respondent, the Federal Energy Regulatory Commission (FERC).

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[1] Pacific Power & Light Company and Utah Power & Light Company are now assumed business names for divisions of the electric operations of PacifiCorp pursuant to a merger consummated in 1989.

Western Utilities, whose service area includes all or significant parts of seven western states, own and operate 92 hydroelectric projects under FERC licenses. In an average year, these facilities produce approximately 20,125,920,000 kWh of electricity. Western Utilities are concerned that state agencies, including Petitioner State of California, through the California State Water Resources Control Board (CWRCB), are beginning to assert, under the guise of water rights allocation proceedings, authority to regulate projects already under FERC jurisdiction. The confusion and duplication of regulatory requirements that would result from such assertions threatens Western Utilities' individual projects, their integrated systems, and the nation's hydropower resources as a whole. Western Utilities urge this Court to affirm the United States Court of Appeals for the Ninth Circuit's ruling in this case[2] that FERC has the exclusive jurisdiction to set regulatory conditions, including minimum instream flows for fish protection, at hydroelectric projects licensed under the Federal Power Act.

INTRODUCTION

The State of California's appeal in this case, and its attack on this Court's decision in *First Iowa Hydro-Electric Coop. v. FPC (First Iowa)*,[3] depends entirely on claims that, (1) Section 27 of the Federal Water Power Act of 1920[4] was intended to authorize state regulation of federally licensed hydroelectric projects and, (2) that legislative history requires that Section 27 be interpreted in a lock-stepped, identical, manner with Section 8 of the Reclamation Act of 1902.[5] Western Utilities will concentrate this brief on just what the Federal Water Power Act was intended to do, on

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[2] *California ex rel. State Water Resources Bd. v. FERC*, 877 F.2d 743 (1989), *cert. granted California v. FERC*, 58 U.S.L.W. 3369 (U.S. Dec. 4, 1989) (No. 89-333).

[3] 328 U.S. 152 (1946).

[4] 41 Stat. 1077 et seq.; now Part I of the Federal Power Act, 16 U.S.C.A. § 821.

[5] 32 Stat. 390; 43 U.S.C.A. §§ 372, 383.

why the Reclamation Act's interpretation cannot dictate a result here and on how California's desired result conflicts with the Federal Power Act's intention to establish a stable, consistent, licensing system.

SUMMARY OF ARGUMENT

The Federal Power Act's comprehensive regulation of federally licensed hydroelectric development is not susceptible to disruption by state regulatory limitations on hydroelectric operation like those advanced by the State of California because:

1. The Federal Water Power Act of 1920 was created to encourage the development of water power deemed essential for the Nation's progress through comprehensive *federal* hydroelectric regulation, a purpose confirmed and reinforced in the Federal Power Act of 1935.

2. Section 27 of Federal Water Power Act was intended only to defend state laws allocating vested ownership rights to water and not to authorize conflicting state regulatory controls of hydroelectric development.

3. The Reclamation Act of 1902 was not, and is not, the Federal Power Act.

4. The result sought by California would strike at the heart of the licensing stability the Federal Power Act was deliberately designed to create.

ARGUMENT

I. THE FEDERAL WATER POWER ACT WAS INTENDED TO CREATE A COMPREHENSIVE *FEDERAL* SYSTEM OF WATER POWER LICENSING AND REGULATION

The bill that would become the Federal Water Power Act of 1920, merging federal authority over navigation, public lands and interstate commerce, was introduced as an "Administration Bill" in 1918. It was presented to a unique, combined, "Committee on Water Power" in the House of Representatives created at the

special instance of the President,[6] was considered and debated over the next two Congressional sessions, and was enacted early in 1920.[7]

Previous water power legislation had started up separate tracks dealing with public lands and navigation in both the House and the Senate, had been further split among various House Committees, and had faltered on inconsistency and lack of consensus.

World War I brought forth a *national* desire to build up the country's hydroelectric resources as quickly as possible to meet burgeoning demand for electricity under both wartime and anticipated post-war conditions, along with a growing realization of the interconnected, interstate, character of emerging electric systems. The result was a bill that established the same, comprehensive, licensing scheme for projects in navigable waters and on public lands and made provision for discretionary licensing of any project affecting interstate commerce. That basic plan was one that the Administration, private water power developers, and conservationists could unite behind. The Act, because it created a thoroughly federal system of regulation, was not actively embraced by all westerners (many of whom wanted *all* public lands jurisdiction handed over to the states), but they also accepted it based on a desire for speedy development.

The opening witness in the hearings of the Special House Water Power Committee, and the Administration's principal spokesman, ticked off the primary factors driving the legislation:

> • Increased fuel costs have resulted in increased costs of steam-power production and have made the development of power independently of fuel—that is, water power development—increasingly desirable. . . . [T]he utilization of water power reduces pro tanto the use of fuel and lessens the drain

[6] H. Rep. No. 716, House Comm. on Water Power, 65th, Cong. 2d Sess. (1918) at 8-9.

[7] 41 Stat. 1063 *et. seq.*

> on our fuel resources, particularly and most vitally important, the drain on our petroleum resources.[8]
>
> • The demand for power will continue to increase while war continues, in order to supply power to our constantly expanding war industries, and when the war is over to provide for the extension of public utilities and of the electro chemical industries, for electrification of railroads, and for the multitude of other activities that will accompany the period of reconstruction.[9]
>
> • While interconnection of stations is a measure of economy in steam-power development, it is a measure of necessity in any general waterpower development. . . . On account of the extent of the territory which will be involved and of the fact that the power transmission system must ignore State lines, no authority less than the Federal Government will have sufficient jurisdiction either to conduct the investigations or to exercise control over the completed systems.[10]

Senator Jones of Washington, Chairman of the Senate Commerce Committee, put a slightly more emphatic cast on the nation's need for the legislation:

> Why not give those who would develop our working water powers the right to work, the right to build and expand and develop, the right to create a greater and more powerful industrial Nation? Why not give them a law to work under which shall encourage and not hamper their just activities—a law which, while placing them under the constant supervision of the public authorities, and sufficiently safeguarding every public interest, yet shall be of such a fair and businessmanlike nature that under its operation men may hope for a generous return for their work and risk, and capital be

[8] Water Power: Hearings Before the Committee on Water Power, 65th Cong. 2d Sess., (1918) (Hearings), O.C. Merrill at 9.

[9] *Id.* at 10.

[10] *Id.* at 16.

> assured for a safe investment? This done, they will open up deserts and make farms; they will build factories and cities, open up new reaches of inland waterways, employ labor and reduce the cost of living.[11]

The consensus available in 1918-1920, missing prior to that, was that electricity was absolutely essential to the nation's industrial and commercial fabric and water power development was far too important to be further delayed by jurisdictional wrangling and regional jealousy. That conviction carried the Federal Water Power Act through to enactment.

In 1935, the Federal Water Power Act's vision of the national importance of electricity in general and water power in particular was renewed and reinforced with passage of the Federal Power Act, establishing new federal jurisdiction over wholesale electric transactions and specifically extending federal hydroelectric jurisdiction to the fullest by requiring *mandatory* review and licensing of all proposals found to affect interstate commerce.[12]

In 1946, this Court, in *First Iowa*, confirmed the comprehensive character of the Federal Power Act's regulatory scheme and rejected an attempt by the State of Iowa to install its own, competing, regulatory rules.[13] In this case, the State of California asks the Court to ignore the Federal Power Act's primary goal of advancing hydropower development through comprehensive federal authority and to accept instead the notion that the Act secretly intends duplicating systems of federal and state control.

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[11] 59 Cong. Rec. 244 (1919).

[12] *Compare* Section 23(b), 41 Stat. 1075 (1920) with 49 Stat. 846 (1935), 16 U.S.C.A. 817(1).

[13] 328 U.S. 152, 181-182 (1946).

II. SECTION 27 OF THE FEDERAL WATER POWER ACT WAS NOT INTENDED TO AUTHORIZE CONFLICTING STATE CONTROL AND REGULATION OF FEDERALLY LICENSED WATER POWER DEVELOPMENT

By 1918 there was little remaining controversy concerning federal or state authority over water power development. The primary concern of western congressman had always been irrigation and reclamation. Since water power production employs but does not consume water, they were willing to accept complete federal hydro power regulation so long as it preserved state authority to allocate property rights for irrigation and related uses.

There were a few representatives who unquestionably would have preferred state regulation of hydropower development. Congressman Mondell of Wyoming, centrally relied upon by the State of California,[14] repeatedly sought legislation that would provide water power developers with the blanket right to occupy public lands with all regulation of that development remitted to the states. His attempts failed.[15] By 1918, Congressman Mondell, while still asserting that "no legislation is necessary ... other than a good right-of-way act"[16], was simultaneously compelled to observe that "I am assuming that this committee is not proposing to depart from the plan ... outlined in the bill before it, and I simply make that statement in order to keep my record straight."[17]

The Administration Bill contained a provision relating to an applicant's responsibility for providing evidence of his progress in securing state water rights."[18] In the course of the hearings a representative of the New York Conservation Commission proposed that the reference to compliance with state procedures be

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[14] Pet. Br. at 23-24, 30-31 n. 14, 32-33 n. 15, 33-34.

[15] *See* 51 Cong. Rec. 13931-2 (1914).

[16] Hearings., *supra* at 607.

[17] *Id.* at 608.

[18] A precursor of FPA Section 9(a)(2), 16 U.S.C. § 802(a)(2).

expanded to require proof that an applicant had in fact "obtained the consent of the duly constituted authorities of the State" to his waterpower proposal.[19] Congressman Raker of California, one of the most prominent of the "westerners", responded that any such requirement for consent "would practically change the real fundamental principle of this bill", because "the whole scheme would be subject to the regulation and control, in effect, of the State."[20] He went on to draw the critical distinction between merely providing initial evidence of compliance with state rules allocating proprietary water rights and subjecting water power development to state regulatory control by asking "would you not really make [the federal] legislation subordinate to what the State might determine, not only upon navigable streams but particularly on the nonnavigable streams and on public lands"?[21] The suggestion that an applicant must submit to state regulatory control was thus specifically presented to the Committee and was rejected because *it would "subordinate the Federal Government right to the right of the State, and the State would practically control because of a condition of that kind."*[22]

California argues that the Federal Water Power Act's Section 27 was designed to allocate to the states control over the question of how much water should bypass a federally licensed hydroelectric facility to balance fish and wildlife concerns. California's claim has nothing to do with the protection of irrigation, municipal, mining, industrial or any other traditional, proprietary, use of water; nor has California's claim anything to do with any vested rights in and to such uses. Yet the history it relies upon shows that

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[19] Hearings., *supra* at 361.

[20] Hearings, *supra* at 364.

[21] Hearings, *supra* at 366.

[22] Hearings, *Id.* (emphasis added). Congressman Raker also figured in the later, more technical, debate over whether Section 9's "compliance" requirement would be workable. It was that interchange that detailed Section 9 as "simply requir[ing] that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application". (56 Cong. Rec. 9813, Cong. Mondell (1918). *Cf. First Iowa* at 179.

Section 27 was created solely to protect laws authorizing such uses and the appropriative priorities relating to them.

Even before 1918, it was clear that Section 27's precursors had reference only to:

> . . . vested rights or the State laws with reference to water rights or the appropriate distribution of water used for irrigation or municipal purposes.[23]

California cites Congressman Taylor of Colorado at some length as supporting its expansionist view of Section 27.[24] But Congressman Taylor was quite clear in stating his own belief that, while irrigation rights would still be handled by the states, the Federal Water Power Act would be the source of *all regulatory authority to create water power development and to use water for hydroelectric purposes:*

> *This is a power bill and grants rights for power.* Now, if a party appropriates water under State law, or if one of these companies makes an appropriation . . . for irrigation under State law they will have that additional property right *in addition to the power privilege granted here;* but this bill is for the purpose, as I understand it, of giving *authority to create power and utilize water for power purposes.*[25]

Section 27's limited scope was further confirmed on the Senate side, where a leading Senate Conferee, who opposed any federal

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[23] 51 Cong. Rec. 13625 (1914) [Statement of Congressman Ferris *re* H.R. 16673—his own bill]. California now studiously avoids its Ninth Circuit reference to Congressman Ferris' description. *See* Pet. Opening Br. below, March 18, 1988, at 21-22.

[24] Pet. Br. at 24-26, 28, 34.

[25] Hearings, *supra*, at 92 (emphasis added). In subsequent debate Congressman Taylor specifically claimed credit for his success "in getting section 27 put into this bill, *which is the savings clause of our irrigation rights*" (56 Cong. Rec. 9115 (1918) (emphasis added)), closing the circle between his acceptance of federal authority over usage of water for hydropower development and Section 27's protection of state granted property rights.

license fee on states' rights grounds, dismissed concerns about control over water as follows:

> So far as *irrigation* is concerned, and so far as the *use of water for domestic purposes* is concerned, the bill saves to the States all the rights that they have under their State legislation.[26]

Senator Jones of Washington, the most powerful of Senatorial "westerners", had precisely the same view of Section 27:

> The bill expressly provides that nothing contained therein shall affect or interfere with *the laws of the respective States relating to the control of or use of water used for irrigation or for municipal purposes.*[27]

The fact is that western congressmen in the early years of this century wanted *development* and had no interest in incidental power diversions that would not interfere with irrigation, municipal or related consumptive uses.

> Mr. Taylor. . . . is there any reason why we should not enact legislation that will open up resources throughout all the States of the country, especially at this time? Wouldn't it be a wise, statesmanlike proposition?
>
> Mr. Weston. I should say it was, sir; yes, sir. In other words, my plea is for liberality and speed.[28]

The State of California wants to use the men of 1914-1920 to make its case, but it must take them whole—and their views on hydropower development and control were fundamentally at odds with California's disruptive view of Section 27's passive, "saving" language.

As noted above, Congressman Mondell's sporadic efforts to secure water power regulatory power for the public lands states

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[26] 59 Cong. Rec. 1041 (Senator Nelson) (1919) (emphasis added).

[27] 59 Cong. Rec. 245 (1919) (emphasis added).

[28] Hearings, *supra* at 371.

was a lost cause by 1918. In the 1918 hearings, though not a member of the Special Committee, he promoted the inclusion of a Section 27-like provision (albeit without the limiting words "used in irrigation or for municipal purposes or other uses, or any vested right acquired therein").[29] But, in doing so, he and Congressman Taylor, collectively, made it clear that those words were confined to irrigation and related uses and were not intended to limit a power use that would not adversely affect those uses:

> Mr. Taylor. Let me go back to [the Section 27 language] you suggested. *Is it not true that if there is no intention, covertly or otherwise, of infringing upon the irrigation vested rights* in the States ownership of the water on the public lands and nonnavigable streams, *that clause will do no harm by being there?*
>
> Mr. Mondell. I should say not.[30]

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[29] Hearings, *supra* at 613.

[30] Hearings, *supra* at 634 (emphasis added). As the Act moved forward, Congressman Mondell, while still talking about inherent state's rights (*See* 56 Cong. Rec. 9814; *First Iowa* at 179), was forced to concede federal control:

> In my section of the country water power entirely free from Federal control will be running side by side *with water power under Federal control*, and that will be true in every State in the union having nonnavigable streams.

56 Cong. Rec. 9114 (1918) (emphasis added).

That description, in turn, called forth the obvious observation that:

> The line of jurisdiction between Federal control and State control is, of course, very clear and easily stated, *but where once jurisdiction has attached and where once it is put in force, by and through this bill, then I understand that the jurisdiction will be absolute and the State will not be permitted to interfere in any way.*

Id., Congressman Green (emphasis added).

Mondell's response listed possible state/federal overlaps with respect to (1) depreciation reserves and safety, (2) property taxation, and (3) rate regulation—letting stand the central power proposition with respect to control over water power that "once [Federal] jurisdiction has attached . . . [it] will be absolute and the State will not be permitted to interfere in any way." *Id.*

Mondell and Taylor went on to confirm Section 27's purely defensive function:

> Mr. Taylor. And *if there is any such intention* anywhere [i.e. of infringing upon 'irrigation vested rights'], it is of the utmost importance, is it not, for the protection of the people of these Western States, that there should be a claim of that kind in there?
>
> Mr. Mondell. It is of very great importance . . . .[31]

There it is, from the same historical figures California cites for its theory. If a licensed hydroelectric project would not interfere with irrigation-related "vested rights", the saving language placed in Section 27 could not harm complete federal control.

III. THE RECLAMATION ACT OF 1902'S INTERPRETATION IN *CALIFORNIA V. U.S.* DID NOT CHANGE EITHER THE FEDERAL POWER ACT OR SECTION 27

California's assertion that this Court was wrong in *First Iowa* is not based on any change in the Federal Power Act or on anything drawn from the body of judicial and regulatory decisions interpreting the Act since *First Iowa*. Instead, California leaps across 26 titles of the United States Code and 88 years of history to the Reclamation Act of 1902.[32] It demands that the Federal Power Act's Section 27 now be lock-stepped with the Reclamation Act's Section 8, and ignores the immense differences between Congress' 1902 plan to help irrigate the arid west and its 1920 program for comprehensive, nationwide, federal administration of hydroelectric projects.[33]

The Federal Power Act and the Reclamation Act addressed two entirely different problems and were constructed on completely different plans. The Reclamation Act was intended to put federal dollars derived from the sale of public lands in the western

[31] Hearings, *supra* p. 635 (emphasis added).

[32] 43 U.S.C.A. §§ 372, 383.

[33] Pet. Br. at 14.

states back to work in creating public works to irrigate those states. Since the Reclamation Act was created at the instance of the affected states solely for their own, parochial, benefit, it's hardly surprising that the Act has been interpreted as subservient to state water law and policy.

In *California v. United States*,[34] the case now promoted by California as binding here, the Supreme Court stressed the clarity with which the Reclamation Act's legislative history showed that state law was expected to control *every* significant question of water usage and disposition, including the government's own appropriation, purchase or condemnation of water rights and all matters of water distribution.[35] It was thus in the context of a statute whose federal "regulatory" content was virtually nonexistent that the confirmatory Section 8 was installed:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.[36]

In *California v. United States*, California sought to impose limitations related to environmental concerns on water rights being sought by the Bureau of Reclamation for a reservoir. The limitations, while perhaps annoying to the Bureau, were certainly consistent with the Congressional intention to follow state law in

[34] 438U.S. 645 (1978).

[35] *California v. United States* at 665-667.

[36] Sec 8, 32 Stat. 390; 43 U.S.C.A. §§ 372, 383.

supplying water to benefit the state's residents. In the absence of any significant federal regulatory scheme, this Court concluded that there was no preemption and that the state was free to impose regulatory conditions on a reclamation project's use of water.[37]

The Federal Water Power Act, as we have seen, was based on an entirely different intention to create and install a comprehensive, unifying, federal scheme of regulation over hydropower development with irrigation included as only one element in the licensing equation:

> The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious.[38]

The Federal Water Power Act, reenacted in the Federal Power Act in 1935, has been the subject of an imposing array of Supreme Court decisions—all confirming the comprehensive character of its regulatory scheme.[39]

California claims to see a secret qualification behind these indisputable facts, citing to passages in the legislative history indicating that some western congressmen saw the language placed in Section 27 as drawn from similar language used in the

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[37] *California v. United States*, 438 U.S. 645, 675.

[38] *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98 (1965): *Cf.* FPA Section 10(a), 16 USCA 803(a).

[39] *Cf. United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424-427 (1940); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180-181 (1946) *FPC v. Oregon*, 349 US 435, 441-446 (1955); *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98-101 (1965); *Udall v. Federal Power Commission*, 387 U.S. 428, 448-451 (1967).

Reclamation Act's Section 8,[40] but the distinction between the Reclamation Act's complaisant accommodation of state authority and the Water Power Act's robust plan for federal regulation and control was as clear before 1920 as it is today. California's domino theory of statutory interpretation relies heavily on Congressman Mondell (describing him as "the principal author of Section 8 of the Reclamation Act of 1902"), and on his 1914 observation that Section 27's language was "somewhat similar" to the Reclamation Act's Section 8.[41] But the quote provided in California's brief is too closely pruned. The Congressman's complete statement shows that he understood that any "saving" clause in the Federal Power Act would be subjected to a much more critical reading than "similar" language in the Reclamation Act.

In the portion cited by California, Mr. Mondell observed with reference to a 1914 Section 27 precursor that "[i]t is somewhat similar to the provision contained in the reclamation law. . . . ",[42] but he went on to emphasize the importance of the Reclamation Act's lack of any federal regulatory scheme:

> . . . but that provision is all-sufficient as it stands in the reclamation law, *for there is nothing in that law that need raise the question of the right of the State to control the use of water.*[43]

In the Power Act context, Congressman Mondell was not at all satisfied that Section 27 could accomplish what might be done under Section 8 in the Reclamation Act:

> . . . it is not only exceedingly important that it [Section 27 language] remain in the bill, but that it is even more important that other provisions of the bill in conflict with it should go out. It would also be well if this provision of the bill could be so broadened as to clearly express the fact that nothing contained in this legislation should, and nothing

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[40] Pet. Br. at 24-25, 28

[41] Pet. Br. at 23, 24.

[42] 51 Cong. Rec. 13631, Pet. Br. at 24.

[43] 51 Cong. Rec. 13631 (emphasis added).

contained in it can, in fact, interfere with the right of a state to regulate the use of nonnavigable water for all purposes within its boundaries.[44]

A little later on he put it even plainer:

> The only trouble about this provision is that it is not complete enough and far-reaching enough, and I shall offer an amendment to broaden its provisions. *It is not as good a provision as that contained in the irrigation [Reclamation] law*, which, by the way, I had the honor of drawing. *It is not as broad and all-embracing a provision*, but with a slight amendment, including the word 'power', it will do very well.[45]

Section 27's terms, as it turned out, were not broadened as Mr. Mondell desired, state authority was never extended beyond the uses enumerated in Section 27 and Section 8's function within the Reclamation Act remains sharply different from Section 27's role in the Federal Power Act. No amount of claiming that Section 27 was modeled after Section 8 can get around the simple fact that:

> Notwithstanding some similarity in the wording of the statutes, *they serve different objectives, and relate to federal actions fundamentally dissimilar in nature.*[46]

IV. THE OVERRULING OF *FIRST IOWA* WOULD DESTROY LICENSING STABILITY THE FEDERAL POWER ACT WAS CREATED TO PROVIDE

The Federal Water Power Act was the result of a consensus judgment that separate, variable, licensing requirements were thwarting development. Accordingly, one of the Act's most essential goals was the establishment of a single, comprehensive federal licensing system, designed to "promote secure licensee expecta-

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[44] *Id.*

[45] 51 Cong. Rec. 14070 (1914) (emphasis added).

[46] *Springfield v. McCarren*, 549 F.Supp. 1134 (D.Vermont 1982), aff'd., 722 F.2d 728 (2d Cir. 1983); *cert. den.*, 464 U.S. 942 (1983) (emphasis added).

tions".[47] The course proposed by California would thoroughly disrupt that plan.[48]

All FPA licenses now include provisions relating to the protection of fish and wildlife resources.[49] Since every reduction in flow reduces electrical output, flow release conditions like those installed in the Rock Creek license are vital ingredients in the assessment of a project's economic feasibility and its benefit for the consuming public. FERC has been particularly solicitous of fisheries concerns in the western United States; Western Utilities and their customers now encounter a thicket of interrelated flow release and study requirements in every license that comes out. The result is a complex set of operating rules and requirements individually crafted to fit each project. Compliance is critically dependant on the clarity and consistency of the standards.

Under California's interpretation of Section 27, the holder of a federal license would now have a crazy quilt of state rules laid on top of its existing release requirements—all in an atmosphere threatening swift retribution if requirements are overlooked.[50]

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[47] *Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983).

[48] California notes in its brief that hydroelectric developers in California have routinely applied for and secured state water rights that correspond to their use of water for power generation. Pet. Br. at 8 n. 2. Of course, pursuant to Section 9 of the Federal Power Act, Pacific Gas and Electric Company, Southern California Edison Company, and other power developers have routinely made application to the State. As this Court observed in *FPC v. Oregon*, 349 U.S. 435, 450-51 n. 24 (1955) "While we hold that such approval is not necessary, there is no reason why the company should not thus seek State as well as Federal approval of the project". The real point is that, up until now, California has not attempted to use its acceptance of water power entitlements as a tool for undermining federal licensing authority.

[49] *See Udall v. Federal Power Commission*, 387 U.S. 428, 450 (1967); FPA Section 10(j), 16 U.S.C.A. 803(j).

[50] *E.g.*, under FPA Section 31 noncompliance with a federal license term can lead to civil penalties of up to $10,000/day. 100 Stat. 1255, 16 U.S.C.A. 823(b).

California argues that so long as its requirements are more stringent than FERC's there is no conflict. But that overlooks the fact that FERC's mandate, and indeed society's imperative, is the *balancing of* conflicting concerns.[51] A change that increases a flow release, thereby decreasing economic benefits flowing to the public, destroys the balance just as effectively as a change in the opposite direction.

With Western Utilities' transmission interconnections, the end result of a California desire to increase flow releases at the cost of reduced power generation is the withdrawal of electricity otherwise available to consumers throughout the western United States. This withholding of hydro power from interstate commerce to aggrandize local fisheries is functionally indistinguishable from the withholding of hydro power to aggrandize local consumers—a practice vigorously condemned by this Court in *New England Power Co. v. New Hampshire*.[52]

As Congress made clear in 1920, in 1935 and again in 1986 (through passage of the Electric Consumers Protection Act of 1986),[53] the regulation of federally licensed hydroelectric development and operation is a national concern that should and must remain in federal hands.

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[51] FERC's specific obligation is to give "equal consideration" to environmental, power production and all other public interest values. 100 Stat. 1243, 16 U.S.C.A. 797(e).

[52] 455 U.S. 331, 334 (1982).

[53] P.L. 99-495, 100 Stat. 1243; *see especially* 16 U.S.C.A. 797(e), 803(a).

CONCLUSION

California seeks in this case to bring down one of the rocks on which this country's hydroelectric development is founded—this Court's decision in *First Iowa*. But *First Iowa*, repeatedly reinforced by Congress and the Courts, is not ready to fall. The Federal Power Act's underlying premise that federal authority must serve as the final balance point for decisions relating to the sound development of federally licensed hydroelectric resources has stood the test of time.

For the reasons stated herein, the decision of the United States Court of Appeals for the Ninth Circuit, following *First Iowa* and rejecting California's claim to jurisdiction, should be affirmed.

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